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No. 91-1737

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In The

Supreme Court of the United States

October Term, 1991

SHISEIDO COSMETICS (AMERICA) LTD.,

Petitioner,

v.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California Third Appellate District

BRIEF OF RESPONDENT FRANCHISE TAX BOARD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ERRORS AND OMISSIONS ON STATEMENT OF THE CASE

The manner of presentation of facts and omission of other facts by Shiseido Cosmetics (America) Ltd. ("SCA") gives rise to the erroneous impression that only constitutional issues were raised in the administrative process, and that the state unduly delayed deciding these issues. The apparent purpose of this presentation is to enhance SCA's argument that it was denied a "plain, speedy, and efficient" remedy. To correct this factual misimpression,

Franchise Tax Board ("FTB") cites the following additional facts.

The primary issues discussed in SCA's 1978 protest to FTB and 1980 appeal to the State Board of Equalization ("SBE") were the factual issues relating to the unitary nature of SCA's business operations. (Appendix B, 3b-5b, Appendix H, 1h-5h.) SCA did not drop these factual issues and limit the case to constitutional issues until April 1985. (Appendix B, 5b.)

The protest to FTB and appeal to SBE are not "jurisdictional prerequisites" to a suit for refund of tax. The only "jurisidictional prerequisite" is the filing and pursuit of the claim for refund which delimits the issues in the suit. (Cal. Rev. & Tax., §§ 26101-26107; Appendix B, 9b.) Instead of filing a protest in 1978 (see Appendix B, 3b), SCA could have paid the tax and immediately filed a claim for refund. Upon denial of the claim by FTB (or if FTB had not acted on the claim within six months after filing)[1] SCA could have brought this suit, certainly by mid-1979. The procedure of protest to FTB and appeal to SBE were voluntarily chose by SCA. In fact, SCA preferred to defer *any* action at the administrative level until

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[1] California Revenue and Taxation Code section 26103a provided:

> "If the Franchise Tax Board fails to mail notice of action on any refund claim within six months after the claim was filed, the taxpayer may, prior to mailing of notice of action on the refund claim, consider the claim disallowed and bring an action against the Franchise Tax Board on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment."

the outcome of pending cases. (Appendix B, 4b-5b.) FTB eventually objected to continued deferral and brought the matter to decision by SBE. (Appendix B, 5b-6b.)

SCA's counsel on the advice of local counsel affirmatively determined that it was not necessary to file a claim for refund on the basis that filing a claim would be an unnecessary and futile act. (Appendix B, 6b.) It was only this failure to file the claim for refund which the California Court of Appeal determined precluded SCA's suit. (Appendix B, 9b.)

REASONS WHY THE PETITION SHOULD BE DENIED

I

CALIFORNIA'S ADMINISTRATIVE PREREQUISITES TO FILING A SUIT FOR REFUND OF TAX PROVIDE A "PLAIN, SPEEDY AND EFFICIENT" REMEDY

SCA states that "Under the ruling below, the taxpayer was nonetheless required to protest the tax to the FTB, raising its constitutional claims, appeal the decision of the FTB to the SBE, again raising its constitutional claims, and then resubmit its claim for refund to the FTB as a " 'jurisdictional prerequisite' to raising its federal constitutional claims in state court . . . " (Petition, p. 9.)

The above statement is patently false and misleading. SCA was not required to protest the tax, nor appeal to the SBE. There was no requirement of "repetitive suits on the same issue." (Petition, p. 9, fn. 6.) The only jurisdictional requirement was the filing of the claim for refund and participation in administrative proceedings at the FTB

level. (Appendix B, 9b.) The Court of Appeal expressly found that this requirement was "a simple and unburdensome act." (Appendix B, 19b.) Further, this Court has expressly held that FTB's refund procedures constitute a plain, speedy, and efficient remedy. (*Franchise Tax Bd. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 338 (1990), see also *California v. Grace Brethren Church*, 457 U.S. 393, 417 (1982).) FTB submits that a plain, speedy and efficient remedy was available to SCA. SCA simply chose not to take the procedural steps necessary to invoke that remedy.[2] (Appendix B, 6b.)

SCA asserts that the Tax Injunction Act (28 U.S.C. § 1341) does not apply to this case because (1) SCA tried to follow the state system for 13 years, and (2) the tax has been paid. (Petition, p. 9, 2nd. par.) Again, SCA is in error factually and legally. As to (1), this case arises because SCA did *not* follow the state procedures, in that the required claim for refund was not filed. As to (2), the Tax Injunction Act has been held to apply to actions for refund of tax, as well as to prospective collection. (See *Bland v. McHann*, 463 F.2d 21, 27 (5th Cir. 1972), cert. denied, 410 U.S. 966 (1972); *Poer and Company v. Alameda*, 725 F.2d 1234, 1236 (9th Cir. 1983).) See also *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981), in which this Court declined to decide whether the Tax Injunction Act applies to 42 U.S.C. section 1983 actions for damages in tax cases, but determined that the principle

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[2] This Court has recognized that the states may validly impose procedural requirements on suits for refund of taxes. (*McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18 (1990).)

of comity required pursuit of state remedies in such cases. (*Id.*, 454 U.S. at 107.)[3]

This Court has also recognized the necessity of filing an administrative claim as a jurisdictional prerequisite even though the agency has no power to grant relief. In *Weinberger v. Salfi*, 422 U.S. 749 (1974),[4] this Court was faced with a claim that a provision of the Social Security Act was unconstitutional. (*Id.*, 422 U.S. at 753.) The Secretary did not have jurisdiction to determine such matters. (*Id.* at 765.) However, this Court held that the failure to file a claim with the Secretary as required by statute deprived the court of jurisdiction:

> "In the present case, the complaint seeks review of the denial of benefits based on the plain wording of a statute which is alleged to be unconstitutional. That a denial on such grounds, which are beyond the power of the Secretary to affect [sic], is nonetheless a decision of the Secretary for these purposes has been heretofore established. *Flemming v. Nestor*, 363 U.S. 603 (1960). As to class members, however, the complaint is deficient in that it contains no allegations that they have even filed an application with the Secretary, much less that he has rendered any decision, final or otherwise, review of which is

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[3] See also *Nutbrown v. Munn*, 311 Or. 328 (1991), 811 P.2d 131, cert. den. 1/13/92 ___ U.S. ___; and *Hogan v. Musolf*, 163 Wis. 2d 1, 471 N.W.2d 216 (1991), cert. den. 1/13/92 ___ U.S. ___; in which the Supreme Courts of Oregon and Wisconsin, respectively, analyzed *McNary* and found that exhaustion of state administrative remedies was required in similar section 1983 actions.

[4] Cited at Petition, page 11, third paragraph.

> sought. The class thus cannot satisfy the requirements for jurisdiction under 42 U.S.C. § 405 (g). Other sources of jurisdiction being foreclosed by § 405 (h), the District Court was without jurisdiction over so much of the complaint as concerns the class, and it should have entered an appropriate order of dismissal." (*Id*, at 764.)[5]

In the instant case, California provides a plain, speedy and efficient remedy. (*Franchise Tax Bd. v. Alcan Aluminium, Ltd., supra.*) SCA has merely failed to take the necessary steps to pursue that remedy.

II

EXHAUSTION OF REMEDIES IS A VALID STATE JURISDICTIONAL PREREQUISITE TO RAISING FEDERAL CONSTITUTIONAL CLAIMS IN STATE OR FEDERAL COURT

SCA's issue 2 was not raised in the California courts, and those courts have not ruled on this federal issue. Accordingly, issue 2 is not properly before this Court for consideration on certiorari. (*Ellis v. Dixon*, 347 U.S. 458, 460 (1955), rehearing denied 350 U.S. 855; U.S. Sup. Ct. Rules 10.1.(c), 14.1(h), 28 U.S.C.A.)[6] Additionally, this

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[5] In *Weinberger v. Salfi, supra*, 422 U.S. at 766, this Court distinguished between a statutorily prescribed prerequisite which must be met to confer jurisdiction and the judicially developed doctrine of exhaustion, the requirements of which are subject to dispensation by a judicial conclusion of futility.

[6] Additionally, SCA's petition violates U.S. Sup. Ct. Rule 14.1(h), 28 U.S.C.A. in that it misstates the point at which

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Court has upheld the state exhaustion requirement as a jurisdictional prerequisite to its consideration of federal constitutional issues. (See *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 397-398 (1990).) SCA's argument on this issue is totally devoid of merit.

Felder v. Casey, 487 U.S. 131 (1988), relied by SCA for this argument, arose under 42 U.S.C. section 1983. The decision in that case turns on the inconsistency of Wisconsin claims statutes with the compensatory purpose of remedial federal civil rights legislation, and the outcome determinative nature of the claims statutes. (*Id.*, 487 U.S. at 141.) There are no such factors in the present case. *Felder v. Casey, supra*, is clearly distinguishable and inapplicable. (*See Fair Assessment on Real Estate v. McNary, supra*, 454 U.S. at 116, specifically holding that state remedies must be pursued in section 1983 tax cases.)

(Continued from previous page)

issues 1 and 3 were raised (see Petition, p. 7, 2nd par.), and provides no record of the manner in which these issues were treated by the California courts. As noted by the California Court of Appeal, SCA made no direct constitutional attack on the refund statutes in its appeal. (Appendix B, p. 12b.) Federal constitutional issues were first raised in SCA's Petition for Rehearing to the Court of Appeal. Even at that point, SCA did not raise issue 3 in a meaningful manner. The California courts did not rule directly on these issues.

III

SCA LOST ITS RIGHT TO A HEARING ON THE BASIS OF ITS OWN AFFIRMATIVE ACTIONS, AND NOT AS A RESULT OF ANY UNFAIR PROCEDURE EMPLOYED BY THE CALIFORNIA COURTS. THERE WAS NO DENIAL OF DUE PROCESS

SCA had hearings in the California Superior Court and Court of Appeal on each of the state actions cited in this argument. SCA has cited absolutely no authority for the proposition that the rulings of the California court in those hearings constituted a denial of due process. Although the result of those hearings is that SCA is precluded by the statute of limitations from pursuing its constitutional issues with regard to the tax issues, that result arises from SCA's own decision not to file a claim for refund prior to filing suit. (Appendix B, 25b.) It does not arise from any denial of due process in the California courts. In response to SCA's analogy, the playing field was level. The umpire simply decided that SCA failed to pay the price of admission to the game.

CONCLUSION

SCA's petition combines misconstruction of facts with erroneous statements of law, and asserts issues not raised in the courts below. There is absolutely no factual or legal basis for the petition, which should be summarily denied.

DATED: May 27, 1992

Respectfully submitted,

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